120 (2)

No. 08-814

Supreme Court, U.S.
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In The

Supreme Court of the United States

DAVID ELLIS,
Petitioner,

v.

BRADLEY COUNTY, TENNESSEE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioner has presented compelling reasons to grant the Petition where the Sixth Circuit's opinion affirming the District Court's dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) does not present a departure from the usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. Whether Petitioner has presented compelling reasons why this Court should certify a question to the Tennessee Supreme Court when there is no uncertain question of state law whose resolution is determinative to the disposition of the federal claim.

PARTIES

The parties to this proceeding are accurately set forth in the caption.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent, Bradley County, TN is a governmental agency and there is no parent or publicly held company that owns 10% or more of the governmental corporation's stock.

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INTRODUCTION

Petitioner has presented no compelling reasons for his Petition for Writ of Certiorari to be granted by this Court. *See* Sup.Ct.R.10. Petitioner's attempt to comply with the court's rules governing review of lower court decisions is nothing more than a veiled attempt to argue alleged misapplication of a well stated rule of law.

Petitioner's claim that the court of appeals deviated from the usual and accepted course of judicial proceedings is without merit. Petitioner's argument is premised on the misguided theory that a party's "employer" is a factual allegation precluding dismissal under Fed. R. Civ. P. 12(b)(6). For the purposes of federal employment statutes, a party's "employer" is a legal conclusion which is determined as a matter of law by the court. Therefore, there is no departure from the usual and accepted standards in the dismissal of the action pursuant to Fed. R. Civ. P. 12(b)(6).

Petitioner's argument that the case should be certified to the Tennessee Supreme Court likewise lacks merit. There is no uncertain question of Tennessee law which would be determinative in this action.

STATEMENT OF THE CASE

Plaintiff was employed as the administrator of the Tennessee Election Commission sitting in Bradley County, TN. (Pet.App. at 5a). On October 6, 2006, Plaintiff was terminated from his position by the election commission. (Pet. App. at 5a).

On December 7, 2006, Plaintiff filed suit against Bradley County, TN, alleging that his termination was in violation of the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, et seq., the Americans with Disability Act of 1990, 42 U.S.C. §§ 1201, et seq., and multiple state law causes of action. (Pet. App. at 5a). Plaintiff's complaint makes the erroneous legal conclusion that his "employer" was Bradley County, TN. (Pet. App. at 25a).

On March 13, 2007, Defendant filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)[1]. In the motion, Defendant argued that Plaintiff was an employee of the state of Tennessee, and therefore, Bradley County was not the proper party for any actions based on alleged illegal employment actions. (Pet. App. at 4a).

On June 22, 2007, the district court for the Eastern District of Tennessee granted Defendant's

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[1] Defendant's motion also included a 12(b)(1) motion based on sovereign immunity of the state of Tennessee under the 11th Amendment. The district court did not address the 12(b)(1) motion on the grounds that rendering an opinion on the 12(b)(1) motion would in violation of court's jurisdiction under Art. III of the United States Constitution. (Pet. App. at 19a).

motion. (Pet.App. at 4a). After a review of Tennessee Supreme Court and other case law, Tennessee Attorney General opinions, federal case law and Tennessee statutes, the court concluded that Plaintiff was an employee of the state of Tennessee, rather than Bradley County. (Pet. App. at 15a).

On appeal, the 6th Circuit affirmed the district court's dismissal of Plaintiff's claims pursuant to Fed. R. Civ. P. 12(b)(6). (Pet. App. at 1a). In its opinion, the 6th Circuit relied, in part, upon the Tennessee Supreme Court's holding in *Abercrombie v. City of Chattanooga*, 313 S.W.2d 256, 258 (Tenn.1958), which stated that a county election commission, "is not an arm of the county government." (Pet.App. at 3a).

The appellate court also found that the state election commission, rather than Bradley County, had the power to hire, fire, discipline and control Ellis. (Pet. App. at 3a). The 6th Circuit concluded that the various statutes regarding budgeting and finance, state and federal case law, and general agency principals resulted in Ellis being an employee of the State of Tennessee for the purposes of a federal employment law action. (Pet.App. at 3a).

REASONS FOR DENYING THE PETITION

The decision of the 6th Circuit Court of Appeals presents no issues worthy of this Court's attention. Petitioner attempts to create an issue regarding a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) conflicting with Fed. R. Civ. P. 8(a) based on the complaint's contention the Defendant was Plaintiff's "employer." This argument ignores differences between factual allegations and legal conclusions. The 6th Circuit correctly affirmed the dismissal of the complaint pursuant to Fed. R. Civ. P. 12(b)(6) because the status of a Plaintiff's "employer" is a legal conclusion which is properly decided by the court on a motion to dismiss.

Petitioner's argument that the case should be certified to the Tennessee Supreme Court is also lacking merit. Certification is only an appropriate remedy when there is a controlling issue of state law and there is no controlling precedent. Neither of these two factors are present.

While Petitioner has failed to show any deviation from the usual and accepted course of judicial proceedings, even if there was such a showing, the case would not be worthy of this Court's review. This case does not involve any principles of importance to the public, but rather has limited application only to the parties in this dispute. See, 16B Charles Ann Wright et al., *Federal Practice and Procedure* § 4004.1, at 27 (2d ed. 1987).

I. THE 6TH CIRCUIT COURT OF APPEALS' AFFIRMATION OF THE DISTRICT COURT'S DISMISSAL PURSUANT TO FED. R. CIV. P. 12(b)(6) DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Petitioner attempts to create confusion regarding the dismissal pursuant to Fed. R. 12(b)(6) by arguing that the complaint met the minimum pleading requirement of Fed. R. Civ. P. 8(a). (Pet. at 9). However, Rule 8(a) was never the grounds for any motion by Defendant, or ruling by any of the lower courts. (Pet. App. at 1a – 19a). The only actual issue regarding the dismissal of Plaintiff's complaint concerns whether the bare assertion that a defendant is a party's "employer" precludes dismissal pursuant to Rule 12(b)(6). Plaintiff's writ clearly fails to recognize the distinction between factual allegations and legal conclusions and the significance in the disposition of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

While a complaint attacked on a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, the complaint must contain more than labels and conclusions in order to provide grounds for entitlement to relief. *Bell Atlantic Co. v. Twombly*, 127 S.Ct. 1955, 1964-65, 550 U.S. 544 (2007) (quoting, *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932 (1986)). When the allegations in a complaint, however true, could

not raise a claim of entitlement to relief, "this basic deficiency should... be exposed at the point in time of minimum expenditure of time and money by the parties and the court." *Twombly*, 127 S.Ct. 1955 at 1966 (quoting, 5 C. Wright & A. Miller, Federal Practice & Procedure § 1216, pp. 233-234 (3d ed.2004)).

On a motion to dismiss, a court is not bound to accept a legal conclusion couched in terms of a factual allegation as true. *Twombly*, 127 S.Ct. 1955 at 165 (citing, *Papasan*, 478 U.S. 265 at 286). Whether a particular defendant is an "employer" in a federal civil rights case is a legal conclusion rather than a factual allegation which is properly decided by a court in a Rule 12(b)(6) motion. *Hickey v. O'Bannon*, 287 F.3d 656, 657-658 (7th Cir. 2002); *Montgomery v. Brookshire*, 34 F.3d 291, 295 (5th Cir. 1994); *Williams v. Meese*, 926 F.2d 994, 997 (10th Cir.1991); *Armbruster v. Quinn*, 711 F.2d 1332, 1339 (6th Cir. 1983); *Cobb v. Sun Papers*, 673 F.2d 337, 339 (11th Cir.), *cert. denied,* 459 U.S. 874, 103 S.Ct. 163 (1984).

In *Bristol v. Board of County Commissioners of the County of Clear Creek*, 312 F.3d 1213 (10th Cir. 2002), the 10th Circuit was examining a district court's dismissal as a matter of law of an Americans with Disabilities Act claim on the basis that the Defendant, the county board of commissioners, were not the Plaintiff's employer. The Plaintiff claimed that the employment actions of the Sheriff violated the A.D.A. and filed suit against the county *Id.*,at 1215. The county sought

dismissal on the grounds that it was not the Plaintiff's "employer" for the action.

The 10th Circuit examined such factors as who had ability to control or fire the Plaintiff, the state constitution and state budgetary statutes to determine, as a matter of law, whether the county was the proper defendant. *Id.*, at 1219. Ultimately, the court found that the Sheriff, not the county board, had the ultimate authority to hire or fire the Plaintiff and therefore, the Plaintiff's "employer" was the Sheriff, not the county. *Id.* at 1220.

The 11th Circuit has used the equivalent analysis in determining a Plaintiff's "employer" in a federal employment action. In *Welch v. Laney*, the court's dismissal was based on whether the alleged employer had the power to fire, hire, or modify the employment condition of the employee. *Welch v. Laney*, 57 F.3d 1004, 1011 (11th Cir. 1995). In *Welch,* the court affirmed the district court's dismissal of the county defendant pursuant to Rule 12(b)(6) on the basis that the county "had no direct control over Welch [plaintiff]." *Id.*

The district court and 6th Circuit in the case at bar undertook the same accepted analysis for determining Plaintiff's "employer" for the purposes of Plaintiff's federal civil rights claims. (Pet. App.at 1a – 19a). In its comprehensive analysis, the district court accepted all factual allegations in Plaintiff's complaint as true, and then determined

whether Defendant was Plaintiff's "employer" as a matter of law. (Pet. App. at 6a-7a).

In its examination, the district court in this case reviewed various Tennessee statutes, Tennessee Supreme Court and other case law, as well as common-law agency principles. (Pet. App. at 7a- 15a). The court ultimately concluded that Plaintiff was an employee of the state of Tennessee, and therefore Defendant was not Plaintiff's employer. (Pet. App. at 18a-19a).

In affirming the district court's dismissal, the 6th Circuit likewise considered the various statutes and case law. (Pet. App. at 3a). In its analysis, the 6th Circuit found, "Because the Bradley County Election Commission members are hired, fired and disciplined by the state election commission, Bradley County did not have the authority to hire, fire or discipline Ellis." (Pet. App. at 3a). The 6th Circuit affirmed the district court's dismissal on the basis that Bradley County was not Plaintiff's employer, and therefore not a proper defendant. (Pet. App. at 3a).

Petitioner has failed to show any departure from the accepted and usual course of judicial proceeding in the 6th Circuit's affirmation of the district court's dismissal of Plaintiff's complaint pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff's allegation that the county was his employer is a legal conclusion which is properly decided by the court as a matter of law.

Even if there were deviations from the accepted standard regarding dismissal pursuant to Fed. R. Civ. P. 12(b)(6), Petitioner has presented no "compelling reasons" worthy of this Court's review. The specific issue in this case has limited application to anyone other than Petitioner, and therefore, does not raise any issue of national interest.

II. THE 6th CIRCUIT WAS CORRECT IN NOT CERTIFYING THE QUESTION OF WHO WAS PLAINTIFF'S EMPLOYER TO THE TENNESSEE SUPREME COURT.

Certification is only appropriate when there is an uncertain question of state law that would affect the resolution of the federal claim. *City of Houston v. Hill,* 107 S.Ct. 2502, 2514, 482 U.S. 451 (1987)(citing, *Bellotti v. Baird,* 428 U.S. 132, 96 S.Ct. 2857 (1976)). However, as the court in *City of Houston* stated, "It would be ***manifestly inappropriate*** to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *Id.*(emphasis added).

In Tennessee, certification is controlled by Rule 23 of the Tennessee Supreme Court. Under Rule 23, certification may only be invoked when there are questions of law which will be determinative and as to which it appears that there is no controlling precedent in the decisions of the

Supreme Court of Tennessee. *Tennessee Rules of the Supreme Court* § 23.

"If a district court or court of appeals believed that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used." *Lehman Brothers v. Schein*, 94 S.Ct. 1741, 1746, 416 U.S. 386 (1974).

In the case at bar, there are no uncertain questions of state law which are determinative. As both the district court and 6th Circuit pointed out, the Tennessee Supreme Court has specifically found the county election commission not to be an arm of the county government. (Pet. App. at 3a, 10a-11a); See, *Abercrombie v. City of Chattanooga,* 313 S.W.2d 256, 262 (Tenn.1958).

In addition to the clear Tennessee Supreme Court precedent, any such state labels are not determinative in the identity of Plaintiff's "employer" in the current action. The identification of an employer for purposes of federal employment discrimination acts "is a question of federal law." *Carver v. Sheriff of LaSalle County, Illinois*, 243 F.3d 379, 382 (7th Cir. 2001)(citing, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 754-55, 118 S.Ct. 2257 (1998)).

Certification in this case would be completely inappropriate. The Tennessee Supreme Court has established precedent that the election commission

is not an arm of the county government. In addition, any such determination by the Tennessee Supreme Court is not determinative because Plaintiff's "employer" for a federal civil rights case is determined according to *federal law* rather than state labels.

CONCLUSION

The Petitioner has failed to establish any compelling reasons to warrant this Court's review. The petition for writ of certiorari should be denied.

Respectfully submitted,

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